

Letter of Findings: 04-20110025
Sales and Use Tax
For the Year 2008

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ISSUE

I. Sales and Use Tax – Imposition – Exemption.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-4; IC § 6-2.5-5-35; IC § 6-8.1-5-1; [45 IAC 2.2-3-20](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of Revenue v. Kitchin Hospitality, LLC., 907 N.E.2d 997 (Ind. 2009).

Taxpayer protests the imposition of use tax on its purchases of tangible personal property.

STATEMENT OF FACTS

Taxpayer is in the business of operating facilities, such as hotels, ranches, and water parks in the hospitality industry. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer did not pay sales tax or did not self-assess and remit the use tax to the Department on its purchases during 2008. As a result, the Department's audit assessed additional use tax, interest, and penalty.

Taxpayer only protests the imposition of use tax on its purchases of "smart wristbands." Prior to an administrative hearing, Taxpayer submitted additional documentation, including photos and video clips, to support its protest. Since Taxpayer's additional documentation is sufficient to support its protest, this Letter of Findings is written based on the information which Taxpayer provided to the Department. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition – Exemption.

DISCUSSION

The Department's audit assessed additional tax on Taxpayer's purchases of wristbands because the audit determined that Taxpayer did not pay sales tax or did not self assess and remit the use tax to the Department. Taxpayer, to the contrary, asserts that it is entitled to an exemption pursuant to IC § 6-2.5-5-35(a)(2).

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. Generally, "all purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax." [45 IAC 2.2-3-20](#). An exemption from use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974).

IC § 6-2.5-5-35 states:

(a) Except as provided in subsection (b), transactions involving tangible personal property are exempt from the state gross retail tax if:

(1) the:

(A) person acquires the property to facilitate the service or consumption of food and food ingredients that is not exempted from the state gross retail tax under section 20 of this chapter; and

(B) property is:

- (i) used, consumed, or removed in the service or consumption of the food and food ingredients; and
- (ii) made unusable for further service or consumption of food and food ingredients after the property's first use for service or consumption of food and food ingredients; **or**

(2) the:

(A) person acquiring the property is engaged in the business of renting or furnishing rooms, lodgings, or accommodations in a commercial hotel, motel, inn, tourist camp, or tourist cabin; and

(B) property acquired is:

- (i) used up, removed, or otherwise consumed during the occupation of the rooms, lodgings, or accommodations by a guest; or
- (ii) rendered nonreusable by the property's first use by a guest during the occupation of the rooms, lodgings, or accommodations.

(b) The exemption provided by subsection (a) does not apply to transactions involving electricity, water, gas, or steam. (**Emphasis added**).

In *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC.*, 907 N.E.2d 997 (Ind. 2009), the Indiana Supreme Court reversed the Indiana Tax Court decision and ruled in favor of the Department on the issue of whether the hotel-operator (taxpayer) is entitled to an exemption for sales/use tax paid on the utility consumption pursuant to IC § 6-2.5-5-35 (prior to amendment in 2007). The Court in *Kitchin Hospitality* illustrated, in relevant part, that:

We believe that the using up or consumption of the tangible personal property in question must meet two tests in order for the property to be exempt from tax: first, the property must be used up or otherwise consumed "during occupation of the room." Second, the property must be used up or otherwise consumed "by a guest."

Id. at 1001-02.

In this instance, in addition to photos and video clips demonstrating its use of the "smart wristband," Taxpayer explains that:

[Taxpayer] uses two types of single-use, disposable wristbands in its business: a "smart" wristband which contains an embedded electronic chip, and a "traditional" wristband.

The guest rooms and certain exterior doors at the hotel utilize keyless electronic locks. Upon registration, "smart" wristbands are provided to hotel guests in lieu of magnetic key cards.... The "smart" wristbands also provide hotel guests with the capability to charge gift shop, snack bar, or arcade purchases directly to their room. Guests must also have a wristband in order to gain access to the water park.

At the end of a guest's stay the electronic chip is deactivated, no longer permitting access to hotel rooms or the ability to charge items at the gift shop or snack bar. The guest must cut the wristband from his wrist, rendering the wristband unusable for future stays or for other hotel guests.

"Traditional" wristbands are provided to guests who only wish to access the water park. These wristbands do not contain electronic chips to unlock hotel rooms or to charge purchases. [Taxpayer] has either paid sales tax or self-assessed use tax on the purchase of the "traditional" wristbands.

Thus, Taxpayer has provided sufficient documentation demonstrating that the "smart" wristbands are (1) used up or otherwise consumed during occupation of the room, and (2) used up or otherwise consumed by its guests. Thus, Taxpayer is entitled to the exemption on its purchases of the "smart" wristbands pursuant to IC § 6-2.5-5-35(a)(2) and *Kitchin Hospitality*.

FINDING

Taxpayer's protest is sustained.

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